IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION-LAW

GRAHAM B. SPANIER, **Plaintiff,**	:	**No. 2016-0571**
v.	:	
THE PENNSYLVANIA STATE UNIVERSITY **Defendant**	:	

AND NOW this 9th day of November, 2017, in accordance with our Opinion this same date, after careful consideration of Spanier's Preliminary Objections to PSU's Second Amended Counterclaims to Spanier's Third Amended Complaint, as well as PSU's Preliminary Objections to Spanier's Preliminary Objections to PSU's Second Amended Counterclaims to Spanier's Third Amended Complaint, the Responses and Memoranda submitted by the parties, and the representations of counsel at Oral Argument, we note and direct as follows:

1. Spanier's Preliminary Objection 1 to Counterclaim 1 is **SUSTAINED WITH PREJUDICE**. PSU's Preliminary Objection to Spanier's Preliminary Objection 1 is **OVERRULED**.

2. Spanier's Preliminary Objection 2 to Counterclaim 1 is **OVERRULED**

3. Spanier's Preliminary Objection 3 to Counterclaims 1 through 4 is **SUSTAINED IN PART AND OVERRULED IN PART**. The Objection is sustained with prejudice as to any duties flowing from Spanier's role as President as described by the 2010 Employment Agreement. The Objection is overruled as to any claims arising from duties outside of Spanier's role as President, particularly those allegedly derived from HR91.

4. Spanier's Preliminary Objection 4 to Counterclaim 2 is **SUSTAINED WITH PREJUDICE.**

5. Spanier's Preliminary Objection 5 to Counterclaims 1 through 4 is **OVERRULED**. PSU's Preliminary Objection to Spanier's Preliminary Objection 5 is **OVERRULED**.

6. Spanier's Preliminary Objection 6 to Counterclaims 1 through 4 is **OVERRULED.** PSU's Preliminary Objection to Spanier's Preliminary Objection 6 is **OVERRULED**.

7. Spanier's Preliminary Objection 7 to Counterclaims 2 through 4 is **SUSTAINED WITH PREJUDICE**.

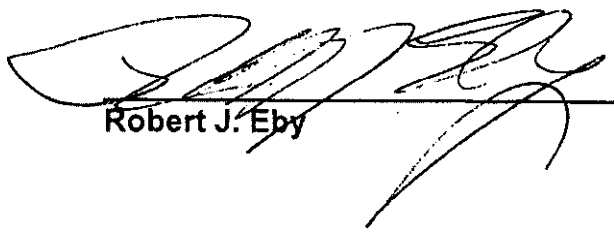
8. Spanier's Preliminary Objection 8 to Counterclaims 1 through 4 is **SUSTAINED IN PART AND OVERRULED IN PART**. The Objection is sustained with regard to the remedy of rescission requested in Counterclaims 1 and 2 and with the regard to the entire cause of action in Counterclaim 3. The Objection is overruled with respect to Counterclaim 4, which does not request rescission.

9. Spanier's Preliminary Objection 9 to Counterclaims 1 through 4 is **SUSTAINED WITH PREJUDICE**.

10. Spanier's Preliminary Objection 10 to Counterclaim 4 is **SUSTAINED IN PART AND OVERRULED IN PART.** The Objection is sustained with prejudice as to any claim of unjust enrichment arising prior to November 9, 2011 and after November 22, 2011. The Objection is overruled as to any claim arising in the period between November 9, 2011 and November 22, 2011.

In light of the above rulings, PSU's Counterclaims 1, 2, 3, and 4 are **DISMISSED WITH PREJUDICE.**

BY THE COURT:



Robert J. Eby, S.J.

RJE/kw

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GRAHAM B. SPANIER,	:	
Plaintiff,	:	**No. 2016-0571**
	:	
v.	:	
	:	
THE PENNSYLVANIA STATE UNIVERSITY	:	
Defendant	:	

APPEARANCES:

ANDREW C. PHILLIPS, ESQ.	FOR THE PLAINTIFF
MICHAEL T. SCOTT, ESQ.	FOR THE DEFENDANT

OPINION BY EBY, S.J., November 9, 2017

The instant action is one of several collateral lawsuits initiated in the wake of the Jerry Sandusky child sexual abuse scandal at Penn State University ("PSU"). Graham Spanier, former President of the University, initiated suit against PSU in 2016, alleging that PSU had breached its obligations under a November, 2011 Separation Agreement entered into by the parties shortly after the Sandusky scandal became public. Currently pending before the Court are Spanier's Preliminary Objections to PSU's Second Amended Counterclaims to Plaintiff's Third Amended Complaint. In response to Spanier's allegations that the University breached the Separation Agreement, PSU has asserted four counterclaims: 1) Spanier's breach of a 2010 Employment Agreement and a Human Resources policy governing conflict of interest; 2) Unilateral Mistake of Fact; 3) Rescission; and 4) Unjust Enrichment. By way of ten preliminary objections awaiting our

resolution, Spanier challenges all four of the University's counterclaims. Also pending before the Court are three Preliminary Objections filed by PSU to the Preliminary Objections of Spanier. For the reasons that follow, we intend to sustain in part and overrule in part the Preliminary Objections of Spanier (Plaintiff/Counterclaim Defendant) and overrule those of PSU (Defendant/Counterclaim Plaintiff).

I. Procedural History

Following this Court's October 25, 2016 resolution of PSU's March 31, 2016 Preliminary Objections to Spanier's February 10, 2016 Complaint, there have been additional Preliminary Objections filed by PSU leading to successively amended complaints; an Answer with New Matter filed by PSU, including Counterclaims; Spanier's Preliminary Objections to those Counterclaims; and subsequent amendments to those Counterclaims in response to the Preliminary Objections thereto. The relevant details necessary for understanding our decision herein include the following:

On February 21, 2017, Spanier filed a Third Amended Complaint, alleging PSU's breach of a November 15, 2011 Separation Agreement executed by the parties while he was President of the University. On March 13, 2017, PSU filed an Answer, which included New Matter consisting of eighteen affirmative defenses and four counterclaims. Following Preliminary Objections to the First Amended Counterclaims[1] included in PSU's March 13, 2017 Answer, PSU, on March 30, 2017, filed Second Amended Counterclaims. On April 19, 2017, Spanier filed ten Preliminary Objections to those Second Amended

[1] The March 13, 2017 Counterclaims were titled "First Amended Counterclaims" because PSU had filed original Counterclaims as part of its December 20, 2016 Answer to Spanier's First Amended Complaint.

Counterclaims. On May 9, 2017, PSU filed a Response, answering seven of the Preliminary Objections and asserting Preliminary Objections to the remaining three. Spanier answered the Preliminary Objections to his Preliminary Objections on May 20, 2017.

Both parties have submitted briefs in support of their positions and appeared for Oral Argument on June 28, 2017. Thus, Spanier's Preliminary Objections to PSU's Second Amended Counterclaims to Spanier's Third Amended Complaint, as well as PSU's Preliminary Objections to Spanier's Preliminary Objections to PSU's Second Amended Counterclaims to Spanier's Third Amended Complaint, are now ripe for our review and disposition.

II. Discussion[2]

A. Spanier's Preliminary Objection 1: Demurrer to Counterclaim 1 (Breach of the 2010 Employment Agreement and Policy HR91) based on Statute of Limitations

PSU's first counterclaim asserts Spanier's breach of two agreements, a 2010 Employment Agreement, which references fiduciary duties outlined in the University's Corporate Bylaws, and a Human Resources policy, Policy HR91. The University argues

[2] Spanier has laid out an exhaustive legal smorgasbord of ten Preliminary Objections. Aside from the sheer volume of the Preliminary Objections, their intermingled nature poses a complex organizational challenge for this Court. Some of Spanier's Preliminary Objections apply to multiple counterclaims; others appear to apply to only one aspect or sub-issue of a single Counterclaim. Our difficulty is further compounded by a supporting Memorandum which is not organized to consider each of the Preliminary Objections individually, particularly Preliminary Objection 4 and Preliminary Objection 7. Due to the convoluted presentation of the issues before us, we believe the least confusing way for the Court to organize its Opinion regarding the pending Preliminary Objections is to address each Objection in order of pleading and explain our narrow decision thereon, independent of our analysis related to other Preliminary Objections, except where our previous analysis is specifically referenced and relied upon. While such an approach may at times result in our deciding an issue that is already moot in light of our decision on an earlier considered Preliminary Objection, the organizational choices of the parties have left us with no other orderly or logical alternative.

that both the 2010 Employment Agreement and Policy HR91 governed the relationship between the parties at the time Spanier negotiated his Separation Agreement with the University. PSU asserts that Spanier breached duties imposed by both agreements, when he failed to disclose to the University information regarding the 2011 grand jury investigation of Sandusky's sexual abuse of multiple victims on the Penn State campus. PSU further asserts that Spanier's failure to make the required disclosures allowed him to gain advantage while negotiating a "without cause" termination of his University presidency, as embodied in the November, 2011 Separation Agreement. Specifically, PSU points to Spanier's failure to disclose to the University the contents of emails sent to or received by him regarding 1) a 1998 allegation of misconduct by Sandusky with a child on University property and 2) Sandusky's having been observed showering with a minor boy on Penn State property in 2001. Defendant's Second Amended Counterclaims, ¶14.

With regard to Spanier's alleged breach of the 2010 Employment Agreement, the University points to Section B of that Agreement, averring:

> Section B ... required Dr. Spanier to "perform such duties and responsibilities that are consistent with his position as President of the University under the corporate Charter, the Corporate Bylaws, and the Standing Orders of the Board of Trustees," and required him to devote his "full business time attention, skill and efforts to the faithful performance of the Duties for the University."

Defendant's Second Amended Counterclaims, ¶6, *quoting* 2010 Employment Agreement, §B. The University argues that the Corporate Bylaws ("Bylaws") in effect in 2011 as referenced in the Employment Agreement "made clear that Dr. Spanier . . . stood 'in a fiduciary relationship to the University which posed special confidence in' him." Second Amended Counterclaims, ¶7, *citing* Corporate Bylaws, Article 6, §1. As specifically delineated by the Corporate Bylaws, those fiduciary duties owed by Spanier to the

University included the duty not to use for personal gain any non-public information he obtained as a result of service to the University; the duty to honor a strict rule of honest and fair dealings with the University; and the duty to exercise the utmost good faith in all transactions involving the University. Second Amended Counterclaims, ¶2. *See also* Bylaws, Article 6, §§1, 2. Additionally, PSU asserts that the Bylaws required Spanier to disclose to the University facts material to the University's decision-making and all facts relevant to a potential conflict of interest with the University. Second Amended Counterclaims, ¶2. *See also* Bylaws, Article 6, § 2.

Counterclaim 1 also alleges a breach by Spanier, as a University faculty member, of Human Resource Policy HR91. In 2011, at the time the parties negotiated the Separation Agreement, Policy HR91 provided, in pertinent part:

> Faculty and staff members of the University shall exercise the utmost good faith in all transactions touching upon their duties to the University and its property. In their dealings with and on behalf of the University, they shall be held to a strict rule of honest and fair dealings between themselves and the University....

Second Amended Counterclaims, ¶9, *citing* Policy HR91 Conflict of Interest.

Spanier has objected to Counterclaim 1 on several bases, including a demurrer based upon an expired Statute of Limitations and the inapplicability of HR91. Because we find that the Statute of Limitations has indeed run on any allegations of breach of duties created by the 2010 Employment Agreement and that PSU cannot, as a matter of law, establish the existence of any duties applicable to Spanier under HR91 during the critical time period, we intend to sustain, with prejudice, Spanier's demurrer to Counterclaim 1.

Under Pennsylvania Rule of Civil Procedure 1028(a)(4), a preliminary objection may be granted for "legal insufficiency of a pleading (demurrer)." *Id.* In reviewing preliminary objections in the nature of a demurrer, only well-pleaded facts and reasonable inferences arising from those facts are accepted as true. *Wiernik v. PHH U.S. Mortgage Corp.*, 736 A.2d 616, 619 (Pa. Super. 1999). The court is free to disregard "conclusions of law, unwarranted inferences from facts, opinions, or argumentative allegations." *Id.* It "may consider only such matters as arise out of the complaint itself; it cannot supply a fact missing in the complaint." *Binsanger v. Levy*, 457 A.2d 103, 104 (Pa. Super. 1983).

Preliminary objections testing the legal sufficiency of a complaint can be sustained only if the plaintiff's complaint indicates on its face "that his claim cannot be sustained, and the law will not permit recovery." *Smith v. Wagner*, 588 A.2d 1308, 1311 (Pa. Super, 1991). If there is any doubt whether preliminary objections in the nature of a demurrer should be sustained, all doubt must be resolved in favor of overruling the preliminary objections. *Green v. Mizner*, 692 A.2d 169, 172 (Pa. Super. 1997).

1. The 2010 Employment Agreement

While the Statute of Limitations is ordinarily considered an affirmative defense that must be pleaded as new matter, where the bar is clear on the face of a complaint, courts have recognized the efficiencies of considering such arguments on preliminary objections. *See Pelagatti v. Cohen*, 536 A.2d 1337, 1346 (Pa.Super. 1987).[3] Our review

[3] Indeed, this Court has done so in other suits related to the Sandusky scandal. *See Spanier v. Freeh*, No. 2013-2707 (Ct. Com.Pl. Centre Cnty., Sept. 27, 2016) at 27. As we explain *infra*, the time bar asserted by Spanier as to PSU's Counterclaim 1 is clear on the face of the Counterclaims and the documents appended thereto. Therefore, we will overrule PSU's Preliminary Objection to Spanier's Preliminary Objection regarding Statute of Limitations in Spanier's Preliminary Objection 1, as well as those asserted by PSU to Spanier's Preliminary Objections 5 and 6.

of the pleadings and the averments of both parties, as well as the relevant documents attached to and relied upon in those pleadings, persuade us that Defendant's Counterclaim 1, as it pertains to the 2010 Employment Agreement, is indeed clearly time-barred.

Our decision regarding the Statute of Limitations applicable to an alleged breach of the 2010 Employment Agreement by Spanier is based upon the following chronology of events evident on the face of the pleadings and the exhibits attached thereto:

• On July 1, 2010, the parties entered into the Employment Agreement, which Penn State has attached in its entirety as Exhibit 1 to its Second Amended Counterclaims. Penn State's Counterclaim 1 specifically identifies Section B of the Employment Agreement as the section breached by Spanier.

• Penn State's Counterclaim 1, quoting only a portion of the text of Section B of the 2010 Employment Agreement, omits from its selective pleading a critical, and for our purposes, dispositive, introductory preface to that section. The whole of Section B, entitled "Powers and Duties", begins with a restrictive series of prepositional phrases: "*During the Term of this Agreement*," 2010 Employment Agreement §B, ¶1, attached to Second Amended Counterclaims as Exhibit 1.

• "Term" as used in Section B of the Employment Agreement is defined in Section A of that Agreement: "The University shall continue the employment of Dr. Spanier as its President for a term from July 1, 2010 through June 30, 2015 (the 'Term'), except as provided in Section H ('Termination') ..." Employment Agreement, §A, attached to Second Amended Counterclaims as Exhibit 1. As evidenced by the Counterclaims of Penn State and the response of Spanier to those Counterclaims, the parties are in agreement that Spanier's position as President of the University was terminated effective November 9, 2011. Second Amended Counterclaims, ¶¶1, 24; Plaintiff's Memorandum of Law in Support of Preliminary Objections to Defendant's Second Amended Counterclaims at 9-11.

• The agreement of the parties as to the November 9, 2011 date is further underscored by the express language of the Confidential Separation Agreement endorsed by both parties. Section 1 of that Separation Agreement states: "Effective November 9, 2011, Dr. Spanier was terminated from his position of President of the University..." Confidential Separation Agreement, ¶1, attached to Second Amended Counterclaims as Exhibit 5.

• Section 2 of the Confidential Separation Agreement further states that, not only have the parties agreed to terminate Spanier's position as President as of November 9, 2011; they have also expressly agreed, with some articulated exceptions, that the 2010 Employment Agreement is terminated as of that date. Section 2 of the Confidential Separation Agreement states: "By virtue of Dr. Spanier's termination from the position of President of the University, it is also understood and agreed that except as otherwise provided below, Dr. Spanier's Employment Agreement was terminated as of November 9, 2011."[4] Confidential Separation Agreement, ¶2, attached to Second Amended Counterclaims as Exhibit 5.

• Any duties assigned to Spanier as President of the University by the 2010 Employment Agreement through its incorporation of the Corporate Bylaws thus ended on November 9, 2011. Since Spanier's duties ended that date, it follows that no breach of those duties could occur after that date. Therefore, only acts or omissions which occurred on or before November 9, 2011, could constitute actionable breaches of the 2010 Employment Agreement.

• The parties executed the Confidential Settlement Agreement on November 15, 2011. *See* Confidential Separation Agreement, at 8, attached to Second Amended Counterclaims as Exhibit 5.

• On November 12, 2015, the parties entered a Tolling Agreement. Second Amended Counterclaims, ¶56, citing Tolling Agreement, attached to Second Amended Counterclaims as Exhibit 6. The Tolling Agreement specified that "Penn State and Dr. Spanier agree that the running of any time limitations, legal or equitable, on claims which Penn State may assert against Dr. Spanier in the future, or which Dr. Spanier may assert against Penn State in the future, relating to his performance as Penn State's President; the negotiation, validity, or enforceability of his Separation Agreement dated November 15, 2011; payments thereunder; and/or his performance or obligations thereunder are hereby tolled as of November 12, 2015....It is not the intent of this Agreement to revive any cause of action which is time-barred as of November 12, 2015." *Id.*

• PSU filed its first set of counterclaims alleging breach of agreement on December 20, 2016, five years and eleven days after the November 9, 2011 termination of the 2010 Employment Agreement.

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[4] The exception noted by the Separation Agreement is: "Dr. Spanier may remain employed by the University, however, as a tenured member of the faculty in the Department of Human Development and Family Studies of the College of Health and Human Development, with the titles of President Emeritus, University Professor and Professor of Human Development and Family Studies, Sociology, Demography, and Family and Community Medicine." Confidential Separation Agreement, ¶2, attached to Second Amended Counterclaims as Exhibit 5. The fiduciary duties described by the Corporate Bylaws and expressly incorporated into the Employment Agreement are not incorporated into Section 2 or, for that matter, anywhere in the Confidential Settlement Agreement. The specifics of Spanier's role as a member of the faculty as described in Section 2 of the Confidential Settlement Agreement are laid out in Section 3 (e) of that Agreement.

In light of the chronology set forth above, the Statute of Limitations issue raised by Spanier's demurrer is easily resolved as to the 2010 Employment Agreement. As proscribed by Pennsylvania statutory law, the statute of limitations for breach of contract is four years. *See* 42 Pa.C.S.A. §5525. Since PSU first filed counterclaims for breach of the 2010 Employment Agreement on December 20, 2016, more than a year outside the four-year window specified by *See* 42 Pa.C.S.A. §5525, Penn State's Counterclaim 1 for breach of the 2010 Employment Agreement is clearly time-barred. The 2015 Tolling Agreement, which preserves actions still viable only as far back as November 12, 2011, does nothing to save the action.

We note that PSU was not initially without recourse for the breach of duties it alleges Spanier committed under the 2010 Employment Agreement prior to its termination on November 9, 2011. PSU could have avoided the time-bar by filing its own breach of contract action prior to November 9, 2015. It could have also, theoretically, negotiated a tolling agreement that specified dates up to and including November 9, 2011. But such hypothetical factual patterns and the vastly different footing they would have provided PSU as to the Statute of Limitations issue remain only that: hypothetical. PSU availed itself of none of those courses of action.

In the absence of such action and now in the face of an expired statute of limitations, PSU is left to save its action for breach with a fantastical contract interpretation that contravenes the plain language of its own exhibits, specifically the Confidential Settlement Agreement. Penn State argues that, although Spanier's position as President was terminated on November 9, 2011, the fiduciary duties of that role as assigned to him by the 2010 Employment Agreement continued while the parties negotiated the terms of

the Confidential Settlement Agreement, either to November 15, 2011, when the parties endorsed the Confidential Separation Agreement, or to November 22, 2011, when, by virtue of Paragraph 16 of the Confidential Separation Agreement,[5] the Confidential Separation Agreement became effective and enforceable. Specifically, PSU's Second Amended Counterclaims state, in pertinent part:

> 34. Pursuant to section 16 thereof, the Separation Agreement did not become effective or enforceable until November 22, 2011—seven calendar days after Dr. Spanier executed that agreement.
>
> 35. In particular, section 2 of the Separation Agreement, which provides that Dr. Spanier's 2010 Employment Agreement "was terminated as of November 9, 2011," did not become effective or enforceable until November 22, 2011. Accordingly, Dr. Spanier continued to owe the University the duties set forth in the 2010 Employment Agreement, including but not limited to the duties set forth in Section B thereof, described supra, up to and including November 22, 2011.

Id. at ¶¶34, 35. Thus, even in the face of language in the binding Settlement Agreement that states, unequivocally, "*Dr. Spanier's Employment Agreement was terminated as of November 9, 2011,*" Penn State urges this Court to find that the duties embodied by and incorporated into the 2010 Employment Agreement were not terminated until November 22, 2011. We have no intention of adopting such a contrived interpretation of the clear language of a contract.

While the Separation Agreement may have only become effective and enforceable after the seven-day revocation period ended on November 22, 2011, that date passed without revocation by either party. This Court is left to construe, then, the binding and unambiguous language carefully considered and agreed upon by counsel for both parties:

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[5] Paragraph 16 of the Separation Agreement states: "For a period of seven calendar days following Dr. Spanier's execution of this Agreement, he may revoke it by delivery of a written notice of revocation to the office of Cynthia A. Baldwin, Esq., Vice President and General Counsel... This Agreement shall not become effective or enforceable before the seven-day revocation period has expired." *Id.* Spanier and the University endorsed the Separation Agreement on November 15, 2011. *Id.* at 8.

"*Dr. Spanier's Employment Agreement was terminated as of November 9, 2011,...*" We find that the Employment Agreement was indeed terminated as of November 9, 2011. We further find, as acknowledged by PSU and in accordance with Paragraph 16 of the Separation Agreement, that the Separation Agreement only became effective on November 22, 2011. Therefore, we necessarily conclude that, during the critical period from November 9 to November 22, 2011, the period during which PSU urges us to find a breach of the 2010 Employment Agreement by Spanier that is not time-barred, the parties were not bound by that Agreement or *any* agreement.

Had the scriveners of the Separation Agreement intended to avoid the creation of a "no man's land" period between the termination date of the 2010 Employment Agreement and effective date of the Confidential Separation Agreement, they could have drafted the Confidential Separation Agreement with clear language that manifested such an intention. For example, if PSU had intended Spanier to be bound by fiduciary duties created by the 2010 Employment Agreement while the parties negotiated the Separation Agreement, PSU could have insisted on designating a later effective date of Spanier's termination under the Employment Agreement, as opposed to the unequivocal designation of November 9, 2011 as that date. Likewise, PSU could have insisted on a provision indicating that, despite Spanier's termination as President on November 9, 2011, he nonetheless remained bound by the duties created in the 2010 Employment Agreement until the effective date of the Separation Agreement. Yet neither of those options is embodied in the Confidential Settlement Agreement that both parties have acknowledged that they, with the benefit of able counsel, negotiated, drafted, and ultimately endorsed.

We intend to enforce the clear language of the Confidential Separation Agreement. We cannot, under the guise of interpretation, do otherwise. As stated by the Superior Court:

> The interpretation of any contract is a question of law.... "In interpreting a contract, the ultimate goal is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement." When construing agreements involving clear and unambiguous terms, this Court need only examine the writing itself to give effect to the parties' understanding. This Court must construe the contract only as written and may not modify the plain meaning under the guise of interpretation.

Humberston v. Chevron U.S.A., Inc., 75 A.3d 504, 510 (Pa.Super.,2013) (citations omitted)

Logically, because "*Dr. Spanier's Employment Agreement was terminated as of November 9, 2011,*" we find that any fiduciary duties owed by Spanier under that Agreement were also terminated on that date. Since, there can be no breach of nonexistent duties, PSU's action for breach of duties created by the 2010 Employment Agreement after November 9, 2011 is the proper subject of a demurrer. We intend to sustain that demurrer as to any alleged breaches of the 2010 Employment Agreement.

2. Human Resource Policy HR91

Our analysis of Spanier's demurrer with regard to Policy HR91 follows a similar line of reasoning, with additional caveats. PSU's Counterclaim 1 asserts that Spanier was subject to Policy HR91 as a faculty member in 2011 once his position as President was terminated. Paragraph 9 of the Second Amended Counterclaim states:

> Penn State Policy HR91, which was in effect in 2011, imposed the duties described in Article 6, Section (2) of the bylaws on Dr. Spanier in his capacity as a faculty member. HR91 provides, in pertinent part:

> Faculty and staff members of the University shall exercise the utmost good faith in all transactions touching upon their duties to the University and its property. In their dealings with and on behalf of the University, they shall be held to a strict rule of honest and fair dealings between themselves and the University. . . .

Second Amended Counterclaims, ¶9. PSU asserts that the fiduciary duties embodied in HR91 have been applicable to Spanier, by virtue of his role as a University faculty member, since 1995 and continued to govern the relationship of the parties despite his termination as University President. Therefore, PSU argues Spanier owed the fiduciary duties to the University described by HR91 during the period from November 9[6]-November 15, 2011, the negotiation period of the Separation Agreement. Second Amended Counterclaims, ¶36. We disagree.

First, we are not persuaded that a Human Resource Policy, in this instance HR91, is a contract between the parties for which PSU may pursue an action at law. Policy HR91 appears to be just that: a policy.[7] Moreover, even if HR91 could be considered to be a contract or a binding provision within a contract, "[t]he formation of a valid contract requires the mutual assent of the contracting parties." *Degenhardt v. Dillon Co.*, 669 A.2d 946, 950, 543 Pa. 146, 153 (Pa.,1996). PSU has failed to plead that Spanier, in 1995 or any time prior to the creation of the 2010 Employment Agreement, assented to be bound to HR91.

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[6] As noted previously, the Tolling Agreement entered into by the parties tolls only those actions not expired as of November 12, 2015. Thus, PSU specifically identifies the period between November 12, 2011 to November 15, 2011 as the dates during which Spanier committed an actionable breach of HR91.

[7] The language of HR91 is not that of a contract between two parties. HR91 states its purpose as: "To avoid the possibility of any misunderstandings concerning the appropriate conduct of faculty and staff members..." *Id.* HR91 further describes compliance or noncompliance with the policy as adherence, not breach. It envisions administrative "heads", not contract actions or courtrooms, as the source of "resolution" of nonadherence to it.

Further, even if Spanier at one time assented to be specifically bound by HR91, such assent was voided by the 2010 Employment Agreement, which states:

> This Agreement fully supersedes any and all prior agreements or understandings, written or oral, with the exception of Section D.3 of the Prior Agreement as amended by Section C.5 of this Agreement.[8] This Agreement shall not be amended, modified, or changed other than by express written agreement of Dr. Spanier and the President of the Board of Trustees.

2010 Employment Agreement, ¶P, attached as Exhibit 1 to Second Amended Counterclaims. In light of the above language, the source of any HR91 applicability to Spanier must come from either the 2010 Employment Agreement and/or the 2011 Confidential Settlement Agreement. Significantly, we find that HR91 is not specifically incorporated into either agreement, a telling omission in light of the specificity of other terms in those agreements.

Second, even if HR91 were somehow incorporated into either the Employment Agreement or the Separation Agreement, we would not be persuaded that HR91 was controlling during the critical post-Employment Agreement, pre-Separation Agreement period of November 9-22, 2011. Consistent with our reasoning sustaining the demurrer as to alleged breaches of the 2010 Employment Agreement, we believe the unambiguous dates agreed to by both parties for the termination of that Agreement and the effective date of the Separation Agreement also control the interpretation of Spanier's role as a "faculty member" of the University subject to HR91. Although the Employment Agreement as originally drafted contemplated a seamless shift from Spanier's role as President to a post-presidency and faculty role, the unanticipated events of the breaking Sandusky

[8] The pleadings do not include the text of Section D.3 or Section C.5. We assume if they were relevant to the applicability of HR91, they would have been attached as Exhibits to Penn State's Second Amended Counterclaims or to Spanier's Preliminary Objections.

scandal led to a termination of the 2010 Employment Agreement in a way neither party contemplated at its inception. In the wake of those unanticipated events, the parties agreed to terminate the Employment Agreement as of November 9, 2011, and they came to new terms for their relationship going forward effective November 22, 2011. Thus, we find that between those dates, Spanier was not a faculty member of the University governed by the guidelines of HR91; he was, instead, a contractual nonentity.

Such a conclusion is the plain meaning and unavoidable interpretation of the parties' joint decision to declare the 2010 Employment Agreement—not just Spanier's position as President--terminated as of November 9, 2011. That the parties were eventually able to enter into a Separation Agreement that incorporated or echoed some of the terms of the 2010 Employment Agreement is irrelevant to our decision. The Separation Agreement was a new agreement, and it became effective 13 days after the parties bilaterally terminated the previous contract governing their relationship.

In an attempt to salvage its claim based upon HR91, Penn State focuses upon the exception language of Paragraph 2 of the Confidential Settlement Agreement, to wit:

> [I]t is also understood and agreed that except as otherwise provided below, Dr. Spanier's Employment Agreement was terminated as of November 9, 2011. **Dr. Spanier may remain employed by the University, however, as a tenured member of the faculty** in the Department of Human Development and Family Studies of the College of Health and Human Development, with the titles of President Emeritus, University Professor and Professor of Human Development and Family Studies, Sociology, Demography, and Family and Community Medicine.

Confidential Separation Agreement, ¶2 (emphasis added). This language, PSU argues, establishes that Spanier became a faculty member immediately upon the termination of his presidency and thus immediately subject to HR91. We do not agree for two reasons: the verb phrase utilized in Paragraph 2 of the Separation Agreement and the later

descriptions of Spanier's future role as a faculty member in Paragraph 3(e) of the Separation Agreement.

We begin with the critical verb phrase, "may remain", as it appears in Paragraph 2 of the Separation Agreement and consider it in light of its plain meaning and ordinary, grammatical sense. *See Profit Wize Marketing v. Wiest*, 812 A.2d 1270, 1275 (Pa.Super., 2002) ("When terms in a contract are not defined, [the] Court must construe the words in accordance with their natural, plain, and ordinary meaning."); *In re Sommerville's Estate*, 417 Pa. 600, 603, 209 A.2d 299, 301 (1965) ("[T]he language should be read in the ordinary and grammatical sense of the words employed. The presumption is that expressions are used in their ordinary and normal signification, unless there is some clear indication to the contrary.") In English grammar, the auxiliary verb "may", as used in Paragraph 2, is a modal verb. As defined by the Oxford Dictionary, a modal verb is "[a]n auxiliary verb that expresses necessity or possibility. English modal verbs include must, shall, will, should, would, can, could, may, and might." *See* Definition of modal verb, English Oxford Living Dictionary, https://en.oxforddictionaries.com/definition/modal_verb (last visited October 10, 2017). While the modal verbs "shall", "will", or "must" express necessity, the modal verb "may" conveys permission, possibility, or hope.[9] *See* Definition of "may," English Oxford Living Dictionary, https://en.oxforddictionaries.com/definition/may (last visited October 12, 2017).

[9] We note that this permissive verb phrase in the Separation Agreement stands in contrast to those utilized by Section E(6) of the 2010 Employment Agreement, which states in pertinent part: "Following his service as President, Dr. Spanier **shall have** the title of President Emeritus. In addition, Dr. Spanier **shall continue to hold** a tenured faculty position as a Professor in the Department of Human development and Family Studies of the College of Health and Human Development of the University." *Id.* (emphasis added). This contrast in modal verb choice further undermines Penn State's position.

Thus, the sentence PSU would have us interpret as immediately converting Spanier into a faculty member does nothing of the sort. A reasonable grammatical interpretation of that sentence is that its language grants Spanier permission to become a faculty member; in the alternative, it recognizes the possibility that he will choose to do so. What it most certainly does not do is support PSU's contention that Spanier automatically became a faculty member on November 9, 2011, particularly in the face of other language in the same document unequivocally stating that the Separation Agreement became effective on November 22, 2011.[10]

Again--and we risk beating a dead horse in making the point--the parties could have avoided the "no man's land" interpretation of the two Agreements. They could have chosen a different verb phrase to describe Spanier's transition to the role of faculty member. They could have drafted the Separation Agreement in such a way as to make clear that, despite the termination of the 2010 Employment Agreement as to his role as President, Spanier nonetheless immediately transitioned from his role as President to one of faculty member. More precisely, they could have drafted the Separation Agreement to establish that Spanier, throughout the negotiation process, was a faculty member still subject to the generally applicable Human Resources policies of the University. They did not do so, and we will not infer such a term when the parties chose language, particularly an undisputed effective date, suggesting the opposite.

Also damning to PSU's assertion that Spanier immediately became subject to HR91 as a faculty member is Paragraph 3(e) of the Separation Agreement. It states:

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[10] Based on the language drafted by the parties, we believe the whole of the Separation Agreement became effective on November 22, 2011, particularly since the Separation Agreement includes no language suggesting that Section 2 of that Agreement had a different effective date.

> Following completion of the one-year post-presidency transition period, Dr. Spanier may continue as a tenured member of the faculty, with a salary of $600,000 annually for a period of five years, with all the provisions of Section E(6) of the Employment Agreement being applicable.[11] Thereafter, Dr. Spanier's employment and compensation as a tenured faculty member shall be governed by the University's policies, rules and regulations applicable to other tenured members of the faculty of the University.

Id. Thus, the Separation Agreement appears to make Spanier a "special" type of faculty member for six years. Unlike the 2010 Employment Agreement, which had specifically incorporated the Corporate Bylaws, the Separation Agreement language governing Spanier's post-presidency role at the University includes no similarly specific reference, either to those Bylaws or to Human Relations policies. Only when Spanier becomes a "regular" faculty member six years after his presidency terminates does Paragraph 3(e) articulate that the "policies, rules and regulations applicable to other tenured members of the faculty of the University" apply to Spanier.

The fact that a reference to the "policies, rules and regulations applicable to other tenured members of the faculty of the University" first appears at the six-year mark, but not before, is critical from a contract construction standpoint. The law assumes that the parties chose the language of their contract carefully. *Liazis v. Kosta, Inc.,* 421 Pa.Super. 502, 618 A.2d 450 (1992). Therefore, we must assume that the parties' negotiated for and intentionally chose to have the Separation Agreement remain silent regarding the application of the "University's policies, rules and regulations applicable to other tenured members of the faculty of the University" during its description of other phases of

[11] Section E(6) of the Employment Agreement establishes a similar three-tiered post-presidency employment scenario for Spanier. It, too, designates that Spanier as a tenured faculty member would be subject to the "University's policies, rules and regulations applicable to other tenured members of the University faculty" only six years after his termination as President of the University.

Spanier's post-presidency employment period. *See Empire Sanitary Landfill, Inc. v. Riverside School Dist.*, 739 A.2d 651, 655 (Pa.Cmwlth.,1999) ("[F]or the purposes of determining the intent of parties to a contract, the maxim *expressio unius est exclusio alterius* is applicable and that it 'translates into the proposition that the mention of particular items implies the purposeful exclusion of other items of the same general character.'") *See also TIG Specialty Ins. Co. v. Koken*, 855 A.2d 900, 908 (Pa.Cmwlth., 2004) (holding that, in construing a contract, the court must focus upon "what the agreement itself expressed and not on what the parties may have silently intended.")

PSU protests such a construction, saying it is absurd to conclude that the E(6) language of the Employment Agreement and, by extension, Paragraph 3(e) of the Separation Agreement, means that "none of the University's policies, rules or regulations, including but not limited to HR91, apply to [Spanier] during the five-year period when the University is paying him $600,000 per year." Memorandum of Law in Opposition to Preliminary Objections to Second Amended Counterclaims at 9. But that precise construction is necessitated by the plain meaning of the language chosen to describe Spanier's post-presidency relationship with PSU not just once, but twice. It would not be proper for this Court, "under the guise of construction, to alter the terms to which the parties, whether in wisdom or folly, expressly agreed." *Delaware County v. Delaware County Prison Employees Independent Union,* 552 Pa. 184, 190, 713 A.2d 1135, 138 (1998).

PSU further argues that the inclusion of the "policies, rules or regulations" phrase in the description of the final phase of Spanier's post-presidency period is not determinative, because that phrase relates only to salary considerations. The University

argues: "All section E.6 was designed to accomplish was to make clear that the 'guaranteed' $600,000 annual salary established by the Employment Agreement would no longer apply after five years. Nothing more." Memorandum of Law in Opposition to Preliminary Objections to Second Amended Counterclaims at 10.

Such an argument is disingenuous. It conveniently ignores other language appearing in both Section E.6 of the Employment Agreement and Paragraph 3(e) of the Separation Agreement clearly indicating that the phrase relates to more than the narrow issue of salary. The critical sentence of Section E.6 of the Employment Agreement states: "Dr. Spanier's **employment** as Professor subsequent to this period, **including his eligibility for annual salary adjustments**, shall be governed by the University's policies, rules and regulations applicable to other tenured members of the University faculty..." *Id.* (emphasis added). Such language uncontrovertibly indicates that salary considerations are but one item among a broader category of employment issues to be governed by the University's "policies, rules and regulations." Had the parties intended differently, had they agreed to the interpretation that PSU now urges on us, they would have simply written: "Dr. Spanier's *salary* as Professor subsequent to this period, *including his eligibility for annual adjustments*, shall be governed by the University's policies, rules and regulations applicable to other tenured members of the University faculty...."

The language of 3(e) of the Separation Agreement, which incorporates the provisions of E.6 of the Employment Agreement, also disproves PSU's contention that the Employment Agreement's reference to policies, rules and regulations relates only to salary. The critical sentence of Paragraph 3(e) states: "Thereafter, Dr. Spanier's *employment* ***and*** *compensation* as a tenured faculty member shall be governed by the

University's policies, rules and regulations..." *Id.* (emphasis added) In that sentence, "and" is a coordinating conjunction, joining together two nouns of equal rank, "employment" and "compensation." *See* Definition of coordinating conjunction, English Oxford Living Dictionary, https://en.oxforddictionaries.com/definition/coordinating_conjunction (last visited October 13, 2017.) The plain meaning of the sentence as drafted by the parties is that "the policies, rules and regulations" referenced apply to the broad terms of Spanier's employment, not just his compensation. Penn State cannot credibly argue otherwise.

We therefore find that PSU has failed to establish, as a matter of law, the existence of any duties applicable to Spanier under HR91 during the critical time PSU alleges breach. We intend to sustain, with prejudice, Spanier's demurrer to the breach of HR91 as averred by PSU.

B. Preliminary Objection 2: Demurrer to Counterclaim 1 (Breach of the 2010 Employment Agreement and Policy HR91) based on Mediation Clause in Employment Agreement

The second preliminary objection posited by Spanier to Counterclaim 1 is based upon a Mediation Clause in the 2010 Employment Agreement. Spanier demurs to Counterclaim 1, arguing that Section K of the Employment Agreement first required Penn State to seek mediation before filing a claim against Spanier for breach of the Agreement. We disagree.[12]

Section K of the 2010 Employment Agreement states:

> The parties agree that any controversy or claim that either party may have against the other arising out of or relating to the construction, application or enforcement

[12] Had we agreed, it would have been proper for this Court to address Spanier's Preliminary Objection 2 first, since a binding mediation agreement would have precluded us from considering the other grounds for demurrer.

> of this Agreement, as well as any controversy or claim based upon the alleged breach of any legal right relating to or arising from Dr. Spanier's employment and/or termination of his employment shall be submitted to non-binding mediation....

2010 Employment Agreement, ¶K, attached to Second Amended Counterclaims as Exhibit 1.

Had the 2010 Employment Agreement still been in effect at the time Penn State initiated action against Spanier for alleged breaches of the 2010 Employment Agreement, or at least had that Agreement not been specifically terminated,[13] we would be inclined to agree that Penn State was required to seek mediation before filing suit for alleged breaches by Spanier of the 2010 Employment Agreement. As we explained in a previous section of this Opinion, however, the 2010 Employment Agreement ceased to govern the relationship between the parties on November 9, 2011. While the Separation Agreement created a new relationship between the parties effective and enforceable on November 22, 2011, and certain sections of the Employment Agreement were incorporated into the Separation Agreement as to the terms of that new relationship, Section K was not one of those incorporated sections. Therefore, at the time Penn State filed its Counterclaims against Spanier, it was under no obligation to first seek or plead mediation.

C. Preliminary Objection 3: Demurrer to Counterclaims 1,2, 3, and 4 based on Failure of Penn State to plead existence of duty to disclose on part of Spanier in light of Paragraph 8 (a release by Penn State) and Paragraph 17 (an integration clause) of Separation Agreement

[13] While Section K specifically states mediation is required for controversies arising out of Spanier's "termination of his employment" and thus could theoretically be construed as surviving Spanier's termination as an employee, the Separation Agreement specifically states, as noted previously, that the Employment *Agreement* was terminated.

Spanier's third preliminary objection relates to all four Counterclaims asserted by Penn State. Spanier demurs, arguing that he was absolved from any duty to disclose in light of the language of two paragraphs of the Separation Agreement, Paragraph 8 and Paragraph 17. Paragraph 8 of the Separation Agreement, a release, states:

> The University, on behalf of itself and the Board of Trustees, does hereby irrevocably and unconditionally remise, release and forever discharge Dr. Spanier from any and all claims, known and unknown, that the University has or may have against Dr. Spanier for any acts, omissions, practices or events up to and including the effective date of this Agreement and the continuing effects thereof, *to the extent such acts or omissions relate to his position as President of the University,* it being the intention of the University to effect a general release of all such claims.

Separation Agreement, ¶8, attached to Second Amended Counterclaims as Exhibit 5 (emphasis added). Paragraph 17, an integration clause, states:

> The parties hereto further understand and agree that the terms and conditions of this Agreement constitute the full and complete understandings and arrangements of the parties *with respect to the terms of Dr. Spanier's termination from the position of President of the University* and that there are no agreements, covenants, promises or arrangements other than those set forth herein *with respect to that subject.*

Separation Agreement, ¶17, attached to Second Amended Counterclaims as Exhibit 5 (emphasis added.)

Even if PSU had filed its breach of contract claim within the appropriate timeframe to avoid the bar of the Statute of Limitations, with respect to any claims PSU may have had deriving from the 2010 Employment Agreement, we agree with Spanier that the release provision of Paragraph 8 of the Separation Agreement precludes PSU from seeking relief.[14] While PSU argues it agreed to the release because it assumed Spanier

[14] We stated in our discussion of Preliminary Objection 1 that any claims PSU had under the 2010 Employment Agreement had to be filed prior to November 9, 2015 to avoid a Statute of Limitations Bar. As we explain in this discussion of Preliminary Objection 3, however, even claims filed prior to that date would be barred by the release and integration clauses of the Separation Agreement. To the extent PSU's breach of contract claim relates to acts and omissions after November 9, 2011, we have already

had disclosed all nuances of his involvement in and knowledge of the Sandusky scandal and would have not agreed to such a release if Spanier had actually done so, the exact language of Paragraph 8 precludes such an argument. It acknowledges claims "known and *unknown*;" it "unconditionally" remises, releases and forever discharges from "*any and all* claims;" it unequivocally states an intention to effect a general release of all claims for "*any* acts, omissions, practices or events...." Separation Agreement, ¶8, attached to Second Amended Counterclaims as Exhibit 5 (emphasis added). Having assented to such language, PSU cannot now seek to avoid its effect. To find otherwise would completely abrogate the broadly inclusive language both parties negotiated and endorsed. PSU, having agreed to such language, cannot expect this Court to save it from its own want of due diligence in negotiating and drafting.[15]

Even were the broad and all-inconclusive language of the release paragraph not controlling, we would find that the integration clause of the Separation Agreement precludes PSU from challenging enforcement of the Agreement based upon Spanier's alleged non-disclosure. In *Blumenstock v. Gibson*, 811 A.2d 1029, 1035-36 (Pa.Super. 2002), the Superior Court held that an integration clause bars the admission of parol evidence regarding supposed representations outside of the written agreement, because "the case law clearly holds that a party cannot justifiably rely upon prior oral representations yet sign a contract denying existence of those representations." *Id.* In this instance, PSU's only hope of pursuing relief against Spanier hinges upon voiding the

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held that Spanier was not bound by any contract with PSU from November 9, 2011 to November 22, 2011.

[15] PSU admits that its argument for the nonbinding nature of the release of Paragraph 8 is dependent upon this Court finding that the Separation Agreement is not enforceable. PSU's Memorandum in Opposition at 18. As we explain above, the language of the Separation Agreement agreed to by PSU precludes such a finding. While fraud in the inducement could potentially negate a release, PSU has repeatedly stated it is not alleging fraud. *See, e.g.,* PSU's Memorandum in Opposition at 15.

release of the Separation Agreement through the introduction of parole evidence indicating Spanier failed to disclose information that would have resulted in PSU negotiating a termination of Spanier's presidency with less favorable terms. It thus seeks to do precisely[16] what the parole evidence rule prohibits with regard to releases.

We recognize, as PSU urges us to do, that in some narrow instances fraud in the inducement may nullify a release when an accompanying integration clause represents a partial rather than complete integration. *See Cabot Oil & Gas Corp. v. Jordan*, 698 F. Supp.2d 474, 478 (E.D. 2010) (noting that the general rule "continues to involve a twofold inquiry, i.e., whether the contact is fully integrated and whether the subject of the alleged misrepresentation is a subject covered in the contract.) Yet, for two reasons, such a principle does not save PSU's counterclaims in the face of the actual release and integration paragraphs of the Separation Agreement.

First, PSU has argued, repeatedly, that it is not claiming fraud on the part of Spanier. *See, e.g.,* PSU's Memorandum in Opposition at 15. What PSU does claim is that Spanier negotiated the Separation Agreement with PSU while failing to disclose facts that make that Agreement unsavory for PSU now that it has become aware of those facts. PSU has cited no case law for the authority that a failure to disclose, rather than fraud in the inducement, can nullify a release in the presence of an integration clause.

[16] To some extent, PSU seeks even a deeper relaxation of the parole evidence rule, because it seeks to bring in not prior oral or written representations but prior *implied* representations.

Second, we find that paragraph 17 does create a fully integrated agreement, and Pennsylvania law prohibits recovery, even on a claim of fraud in the inducement, where a contract represents a fully integrated written agreement.[17]

> Where the parties to an agreement adopt a writing as the final and complete expression of their agreement, ... evidence of negotiations leading to the formation of the agreement is inadmissible to show an intent at variance with the language of the written agreement. Alleged prior or contemporaneous oral representations or agreements concerning subjects that are specifically dealt with in the written contract are merged in or superseded by that contract. The effect of an integration clause is to make the parol evidence rule particularly applicable. Thus the written contract, if unambiguous, must be held to express all of the negotiations, conversations, and agreements made prior to its execution, and neither oral testimony, nor prior written agreements, or other writings, are admissible to explain or vary the terms of the contract.

1726 Cherry St. Partnership v. Bell Atlantic Properties, Inc., 439 Pa.Super. 141, 653 A.2d 663, 665 (Pa.Super.Ct.1995) (citing *McGuire v. Schneider, Inc.*, 368 Pa.Super. 344, 534 A.2d 115, 117–18 (Pa.Super.Ct.1987)). *See also Hart v. Arnold*, 884 A.2d 316, 340 (Pa. Super. 2005) ("Likewise, fraud-in-the-inducement claims are commonly barred if the contract at issue is fully integrated.)

PSU challenges the conclusion of complete integration, suggesting the Separation Agreement represents only a partially integrated agreement on two grounds. First, PSU argues that the release and integration clauses of the Separation Agreement are limited in scope, stressing that "[t]he scope of this integration clause is limited to 'the terms of Dr. Spanier's termination' from the presidency, and does not include, or even make any reference to, the facts and circumstances that led the University to terminate him from the

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[17] Distinct from this rule is a claim for fraud in the execution, which PSU does not allege. The Parole Evidence Rule does not apply, even in cases involving an integrated agreement, in instances of fraud in the execution. *DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 590 (Pa.Super.,2013)

presidency in the first place." Memorandum in Opposition at 14, *citing* Separation Agreement at ¶17.

Such an argument is not credible. It is internally inconsistent with PSU's position in responses to other Preliminary Objections, in which PSU argues it would not have agreed to the "terms" of Spanier's termination from the Presidency—specifically the "without cause" provisions of Section H(2) of the 2010 Employment Agreement—if it had known of Spanier's nondisclosure. Second Amended Counterclaims, ¶¶25-26; Confidential Settlement Agreement, ¶1 ("Effective November 9, 2011, Dr. Spanier was terminated from the position of President of the University *without cause pursuant to Section H(2)* of his Employment Agreement dated July 1, 2010...") (emphasis added). In light of its characterization of the "without cause" designation as a "term" of Spanier's termination, PSU cannot credibly argue that the "terms" of Spanier's termination have nothing to do with the circumstances that led up to that termination.

PSU next argues that an agreement can only be fully integrated when the alleged oral representation or omission concerns a subject that "is specifically addressed in the written contract, and the written contract covers or purports to cover the entire agreement of the parties." Memorandum in Opposition at 14, *citing Blumentstock, supra,* 811 A.2d at 1036. PSU urges us to find that, despite the existence of an integration clause purporting to represent the entire agreement of the parties, the Separation Agreement is not a completely integrated agreement, because it does not address the subject of possible nondisclosure on the part of Spanier. Specifically, PSU notes that the Separation Agreement fails to include reference to representations by Spanier regarding his knowledge of Sandusky's conduct or any provision whereby the University disclaims

reliance on such representations. This lack of specificity, PSU argues, results in an agreement that is not fully integrated. We disagree.

The "without cause" nature of Spanier's termination, which dictated the framework for the benefits incorporated into the Separation Agreement, is indeed a subject addressed by the Separation Agreement and, critically, the exact subject from which PSU seeks relief.[18] Moreover, as explained previously, in the same document which explicitly states that Spanier's termination was without cause, PSU assents to broad release language which acknowledges the possibility that there have been potential "unknown omissions" (a synonym for nondisclosures) chargeable to Spanier. Yet, even in this context of PSU's admitted lack of knowledge and the potential for omissions on Spanier's part, the Agreement nonetheless articulates PSU's expressed and unconditional willingness to grant Spanier release. As such, even if PSU were claiming fraud in the inducement, we would be comfortable finding that the Agreement adequately addresses the subject matter of Spanier's alleged false and implied assurance. See *HCB Contractors v. Liberty Place Hotel Associates*, 539 Pa. 395 (Pa., 1995). In the face of a valid and complete integration clause, any evidence of false representations or "non-

[18] A small caveat to this analysis relates to any duties flowing not from Spanier's position as President but from a position as faculty member under HR91. Neither the release of Paragraph 8 nor the integration clause of Paragraph 17 purport to cover Spanier's role or duties as a faculty member. Paragraph 8 limits its application with the following verbiage: "...to the extent such acts or omissions relate to his position as President of the University..." Id. Paragraph 17 limits its application with two specifically restricting series of prepositional phrases: "with respect to the terms of Dr. Spanier's termination from the position of President of the University" and "with respect to that subject". *Id.* In light of such language, we cannot agree that the release and integration paragraphs of the Separation Agreement bar Penn States claims regarding Spanier's alleged failure to comply with duties he owed outside of his role as President of the University. However, in light of our reasoning and decision regarding Preliminary Objection 1, the practical effect of this differentiation is, in the end, irrelevant.

representations", as PSU seems to rely upon in this case, would be barred by the parole evidence rule.

PSU necessarily disagrees with this conclusion, arguing that highly specific references about what Spanier knew or didn't know about Sandusky needed to be included in the Agreement to make it fully integrated. Even more incredibly, PSU argues that the requirement of such specificity applies even in the absence of a claim of fraud. Memorandum in Opposition at 15. The logical trajectory of PSU's position is a mandate that contracting parties specifically include all possible considerations, expectations, and assumptions that underlie (or do not underlie) every agreement. While such exacting and exhaustive drafting would keep the Bar employed, such a requirement is not practical, if even possible. The burden of predicting the unspoken expectations or assumptions of another party to a contract when that party has failed to insist that his expectations or assumptions, which he alone may be privy to, be included in the contract is not one we intend to impose.[19] In the place of such burdensome drafting, practitioners of commercial law routinely rely upon release and integration clauses exactly like those utilized in the Separation Agreement at issue.

If PSU indeed assented to the terms of the Separation Agreement based upon false assumptions about what Spanier should have or did disclose, it was up to PSU to include those terms, along with a contingency for nondisclosure, in the Separation Agreement.

> There is no sound reason to allow a fraud in the inducement claim to go forward when the plaintiff alleges that he relied on allegedly fraudulent statements that he did not insist be included in the final written contract. Pennsylvania's parol evidence

[19] Indeed, such a burdensome drafting requirement could result in fraud in the inducement claims in every contract dispute.

> rule seeks to protect parties from fraudulent inducement claims which could have been prevented by more complete, more thorough contract formation.

Titelman v. Rite Aid Corp., No. 00-2865, 2001 U.S. Dist. LEXIS 24049, 15-16 (E.D.Pa. Nov. 13, 2001). The broad and inclusive language of the release and integration clauses precludes PSU from obtaining relief from its own lack of due diligence and its own careless drafting of those provisions.

We intend to sustain Preliminary Objection 3 as to duties flowing from Spanier's role as President as described by the 2010 Employment Agreement. We intend to overrule the demurrer of Preliminary Objection 3 as to any claims arising from duties outside of Spanier's role as President, particularly those allegedly derived from HR91.

D. Preliminary Objection 4: Demurrer to Counterclaim 2 based on Penn State's alleged failure to plead a required element of Unilateral Mistake of Fact.

PSU's Second Counterclaim asserts that, "in entering into the Separation Agreement, Penn State reasonably believed in good faith that Dr. Spanier had fully disclosed to the University everything he knew about his, or the University's, awareness and handling of reports of Sandusky's conduct with minors and that Dr. Spanier otherwise was acting consistently with the Duties he owed the University." Second Amended Counterclaims, ¶76. Further, "[a]t the time he was negotiating the terms of the Separation Agreement, as well as prior thereto and thereafter, including November 12, 2011, November 13, 2011, November 14, 2011, and November 15, 2011, Dr. Spanier failed to make a full and complete disclosure of the above described information, including the information contained in the 2012 Discovered Emails and the information that was introduced as evidence at Dr. Spanier's recent criminal trial..." *Id.*, ¶77. But for a unilateral

mistake of fact on the part of PSU–that Spanier had made a full disclosure regarding his knowledge of the Sandusky facts consistent with his contracted duties—PSU asserts it would not have entered into the Separation Agreement, which offered substantial benefits to Spanier, as well as a non-disparagement clause and a release. *Id.*, ¶78-79. As a result of its unilateral mistake of fact, PSU asserts it is entitled to rescind the Separation Agreement, with Spanier being required to disgorge all benefits under the Agreement, or, in the alternative, be excused from continued performance.

The Superior Court, citing The Restatement (Second) of Contracts § 153, has recognized that a contract is voidable due to unilateral mistake under certain circumstances. *See Lanci v. Metropolitan Ins. Co.*, 564 A.2d 972, 974 (Pa.Super.,1989). Section 153 states:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him *if he does not bear the risk of the mistake under the rule stated in §154*, and
>
> (a) the effect of the mistake is such that enforcement would be unconscionable, or
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake.

Id. Spanier has demurred to PSU's Counterclaim 2, arguing that PSU is precluded from asserting that, in entering the Separation Agreement, it did not bear the risk of the mistake. We agree with Spanier that PSU bore the risk of mistake.

Section 154 of the Restatement states:

> A party bears the risk of a mistake when
>
> (a) the risk is allocated to him by agreement of the parties, or

(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

Id.

In light of the language of the Separation Agreement to which PSU assented, the University cannot credibly argue that it did not bear the risk of mistake regarding the depth of Spanier's knowledge regarding the Sandusky scandal. Paragraph 8 of the Agreement, as argued by Spanier, "assumes the potential existence of 'known and unknown' claims PSU may have against Dr. Spanier for 'acts, omissions, practices or events' prior to the date of the agreement relating to Dr. Spanier's position as President of the university, and it places the risk of the existence of any such acts or omissions squarely on PSU by releasing and discharging Dr. Spanier from any and all claims PSU could assert..." Spanier's Memorandum at 25. Paragraph 17 of the Separation Agreement further indicates that "there are no other agreements, covenants, promises or arrangements other than those set forth herein *with respect to [the terms of Spanier's termination from the position of President]."* Separation Agreeement, ¶*17.*

Even if we were to find that, due to the limiting prepositional phrases of both paragraphs, the express language of the Agreement does not completely allocate risk to PSU under subsection (a) of §154, we would find that PSU assumed the risk as described by both subsections (b) and (c) of §154. The fact that PSU assented to the adjectives "known and unknown" suggests the University proceeded forward with the Separation Agreement in conscious ignorance. By such language, PSU admitted it had limited knowledge with respect to the facts to which the alleged "mistake" related but treated that

limited knowledge as sufficient to nevertheless enter the Separation Agreement. Hence, we find that PSU bore the risk of mistake under subsection (b).

Moreover, under subsection (c), it is appropriate and reasonable for this Court, given the circumstances that led up to the Separation Agreement as pleaded by the parties, to allocate the risk of mistake to PSU. As we noted at Oral Argument, PSU, at the time the University negotiated and drafted the Separation Agreement, already knew that numerous high-ranking University officials had knowledge of and possible criminal liability in the scandal. Yet, PSU negotiated a Separation Agreement that included no provision voiding the Agreement if facts later came to light indicating Spanier had similar or related culpability.

As we stated further at Oral Argument, PSU's argument that Spanier should have "confessed" his involvement to the University is ludicrous.[20] Spanier had not yet been charged; it was folly for PSU to assume (and ridiculous for it to argue) that he would confess and invite criminal indictment before such indictment was inevitable. N.T. Oral Argument, June 28, 2017, at 14-18.

PSU could have protected itself; it could have insisted on a provision that provided it with an escape clause in the event Spanier were ever implicated in the Sandusky cover up. It did not do so. Despite the "big black cloud [of Sandusky] hanging there...[that] [e]verybody knew or should have known at that point," it proceeded forward with a Separation Agreement that included no written acknowledgment or incorporation of its

[20] As indicated by counsel at Oral Argument, the University's argument relies on the assumption that the affirmative duties of disclosure embodied in the Employment Agreement were still in effect. We have already explained, in previous sections of this Opinion, why those affirmative duties were no longer in effect. We are incredulous that the University, with all its legal resources, in such a critical matter and moment, would agree to a contract based upon unincorporated, implied "assumptions."

assumptions regarding Spanier's transparency leading up to the execution of the Separation Agreement or any condition precedent that limited the University's responsibilities under the Agreement in the event Spanier were implicated in or indicted for the Sandusky scandal. *Id.* at 16. It is reasonable for the Court to allocate the risk of mistake to PSU under these circumstances apparent on the face of the pleadings.

Since we determine that PSU bore the risk of mistake, we intend to sustain Spanier's demurrer to Counterclaim 2 on the basis that PSU cannot establish a required element necessary for the equitable remedy of Unilateral Mistake of Fact.

E. Preliminary Objection 5: Demurrer to Counterclaims 1, 2, 3, and 4 based on the basis that they are barred by the two year Statute of Limitations for fraud.

Spanier next argues that all of PSU's Counterclaims are time-barred by the two year Statute of Limitations on fraud actions. *See* 42 Pa.C.S.A. §5524(7). While none of PSU's causes of action explicitly seek relief for a cause of action labeled fraudulent inducement, Spanier argues all of PSU's counterclaims sound in fraud and are thus governed by the Statute of Limitations for fraud. Spanier alleges that since the Statute of Limitations for fraud is two years and PSU has averred that it discovered Spanier's alleged nondisclosues sometime in 2012, the latest date PSU could bring counterclaims against Spanier for alleged fraudulent inducement was December 31, 2014.[21] Therefore, Spanier argues that PSU's counterclaims, first filed on December 19, 2016,[22] are clearly time-barred.

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[21] The latest date in 2012 was December 31, 2012.

[22] The Tolling Agreement between the parties would effectively alter this date to November 12, 2015, a date still outside the two-year window.

PSU counters that it is the master of its own pleading. While admitting that a potential tort claim for fraudulent inducement against Spanier would be barred by the two-year statute of limitations applicable to fraud actions,[23] PSU argues it has not raised tort actions in its counterclaims. Rather, in Counterclaim 1, it has raised a breach of contract action, which is subject to a four-year Statute of Limitations, and in Counterclaims 2 through 4, it has raised equitable actions, which are not subject to Statute of Limitations but rather the doctrine of laches, which PSU argues is a fact-sensitive analysis not appropriate for resolution at the Preliminary Objections stage.

We have already held, *supra*, that Counterclaim 1 is an action for breach of contract. Therefore, with regard to Counterclaim 1, we do not agree with Spanier that the two- year statute of limitations for fraudulent inducement applies. Therefore we intend to overrule Spanier's demurrer to Counterclaim 1 under Preliminary Objection 5.

With respect to Counterclaims 2 through 4, we agree with Spanier that an express action for fraudulent inducement would be time-barred by the two-year Statute of Limitations for such actions. We do not agree, however, that PSU, in Counterclaims 2 through 4, has pleaded an action at law for fraud. While allegations of fraud or misrepresentation may be one element underlying PSU's equitable claims for relief (Unilateral Mistake of Fact, Rescission, and Unjust Enrichment), that fact does not convert PSU's equitable claims into tort claims.[24] We agree with PSU that the University is the master of its own pleadings. In this instance, in Counterclaims 2, 3, and 4, PSU has

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[23] At Oral Argument, counsel for PSU admitted the University knowingly allowed the Statute of Limitations to run on possible tort actions because it did not want to be the first to file suit among the parties. N.T. Oral Argument, June 28, 2017, at 53.

[24] PSU's argument appears to misunderstand historical difference between actions at law and actions in equity. The causes of action have, among other differences, different elements. For example, the tort of fraud requires fraudulent intent; equitable claims arising from the same set of facts may not.

chosen to pursue equitable causes of action, not tort ones.[25] That those causes of action may share a common element with a cause of action in tort does not require us to apply the rigid two-year tort time bar that Spanier attempts to impose here.[26]

F. Preliminary Objection 6: Demurrer to Counterclaims 1, 2, 3, and 4 based on the basis that they are barred by the two year Statute of Limitations for breach of fiduciary duty.

Spanier's Preliminary Objection 6 is very similar to his Preliminary Objection 5. Preliminary Objection 6 asserts a demurrer to all four of PSU's counterclaims on the basis that, despite their identification as contract and equitable claims, they are all really tort actions for breach of fiduciary duty and thus subject to and time-barred by the two-year Statute of Limitations of 42 Pa.C.S.A §5524(7). Our analysis regarding Spanier's Preliminary Objection 6 mirrors our analysis and ultimate resolution of Preliminary Objection 5; for similar reasons, we intend to overrule it.

While PSU's breach of contract claim relies on Spanier's alleged breach of fiduciary duties contracted for by the parties, the cause of action asserted by Counterclaim 1 remains a breach of contract claim. PSU's Counterclaim specifically identified the sources of Spanier's fiduciary duties to the University as flowing from two "agreements": the 2010 Employment Agreement and HR91. While PSU could have also pursued a tort action against Spanier for breach of fiduciary duty (and in fact did so in a prior version of its Counterclaims until Spanier objected on Statute of Limitations

[25] PSU originally pursued a claim for breach of fiduciary duty, but dropped that Counterclaim in the face of a prior set of Preliminary Objection from Spanier.
[26] We have already held that PSU's Preliminary Objection to Spanier's Preliminary Objection 5 is overruled. *See* n.3, *supra*.

grounds), the hypothetical possibility of an action in tort does not preclude a concurrent action in contract when the causes of action have overlapping factual elements. Spanier's argument with regard to Counterclaim 1 suggests a misapprehension of the law in that regard.

With regard to Counterclaims 2 through 4, PSU's claims of an alleged breach of fiduciary duty by Spanier are certainly germane to those equitable claims. However, that common theme does not convert PSU's equitable claims into legal ones. While that commonality may ultimately impact PSU's ability to obtain equitable relief, as we discuss in considering Spanier's Preliminary Objection 7, it does not control our resolution of Preliminary Objection 6. A tort claim for breach of fiduciary duty is bound by a two-year Statute of Limitations; equitable claims based upon a breach of fiduciary duty, however, are not.

We will thus overrule Spanier's Preliminary Objection 6 as to all counterclaims.[27]

G. Preliminary Objection 7: Challenge to equitable Counterclaims 2, 3, and 4 on the basis that PSU had a full, complete, and adequate non-statutory remedy at law

The Rules of Civil Procedure permit the filing of a preliminary objection when a complainant has "full, complete and adequate non-statutory remedy at law." Pa.R.C.P. 1028(8). *Id.* Rule 1028(8) is a procedural mechanism to address the requirements Pennsylvania case law regarding the pursuit of equitable relief.

> It is well established that a court of equity will not grant relief to one who has a complete and adequate remedy at law: *Cella v. Davidson*, 304 Pa. 389, 156 A. 99 (1931) and *Penn Galvanizing Co. v. Philadelphia*, 388 Pa. 370, 130 A.2d 511 (1957). This is so, as a general rule, even though fraud be the basis of the action.

[27] PSU's Preliminary Objection to Spanier's Preliminary Objection 6 is also overruled. *See* n.3, *supra*.

Costley v. Smith, 278 Pa. 242, 122 A. 280 (1923); *Bishoff v. Valley Dairy Co.*, 302 Pa. 125, 153 A. 133 (1930).

Sixsmith v. Martsolf, 196 A.2d 662, 663, 413 Pa. 150, 153 (Pa. 1964).

Spanier argues that PSU is not entitled to pursue the equitable remedies of rescission, unilateral mistake of fact, and unjust enrichment because the University had an adequate remedy of law, either a claim of fraudulent misrepresentation or a claim for breach of fiduciary duty. PSU counters that, while it may have, at one time, *had* an adequate remedy at law in a claim for a breach of fiduciary duty, the Statute of Limitations on such a claim is expired, and thus it no longer *has* an adequate remedy at law.[28] Therefore, PSU argues, its equitable claims can be considered by the Court.

The prism through which we must analyze whether a tort cause of action for breach of fiduciary duty provides an adequate remedy at law has been explained by the Supreme Court. In analyzing the adequacy of a remedy of law, the Supreme Court has looked to whether the suggested action at law and the equitable action arise out of the same controversy and cover the same issues. *See Myshko v. Galanti*, 453 Pa. 412, 415, 309 A.2d 729, 731 (Pa.1973). With regard to the potential cause of action for breach of fiduciary duty, we believe the pleadings support a finding that the equitable actions now pleaded by PSU indeed arise out of the same controversy and cover the same issues as an action at law for breach of fiduciary duty. Indeed, PSU, at Oral Argument, did not dispute this conclusion. N.T. Oral Argument, June 28, 2017, at 53.

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[28] As noted previously, with regard to a potential claim for fraudulent misrepresentation, PSU argues that such a legal claim would require it to prove fraudulent intent. Because the equitable remedies sought require no proof of the element of fraudulent intent, a hypothetical claim for fraudulent misrepresentation does not—and would not have—provided an adequate remedy of law. We need not resolve this issue to rule upon Preliminary Objection 7.

What PSU *does* dispute is the consequence of its conscious decision to forego pursuit of this potentially viable claim at law within the two-year Statute of Limitations after the Discovered Emails became public in 2012. PSU argues that it may still avail itself of equitable remedies, because the once adequate remedy at law is no longer available and therefore no longer adequate. Thus, the critical issue for resolution with regard to Preliminary Objection 7 is whether it is appropriate for this Court to exercise its equitable powers to aid a complainant who has knowingly and willingly allowed the statute of limitations to run on its parallel claims at law. Given the fact that PSU is solely responsible for its loss of an adequate[29] remedy at law, we decline to do so.

In every case, the exercise of jurisdiction in equity rests in the sound discretion of the court and depends on the special circumstances disclosed. 30A C.J.S. Equity § 49. In the instant case, we are not inclined to invoke the equity jurisdiction of the Court to come to the aid of a complainant who slumbered on its rights at law due to no fault of the other party. *See* Adequacy of Action at Law, 15 Standard Pennsylvania Practice 2d § 83:240 ("Even if the plaintiffs are precluded from resorting to an action at law because of the statute of limitations, the mere fact that the statute of limitations will bar a recovery at law is no ground in itself for applying to equity for an injunction where the plaintiffs were not prevented from suing by the defendant's acts.") *See also Jostan Aluminum Products Co., Inc. v. Mount Carmel Dist. Industrial Fund*, 389 A.2d 1160, 1164, 256 Pa.Super. 353, 360–61 (Pa.Super.,1978) (plurality) (stating "(u)nder most authorities, the mere fact that

[29] The availability of an adequate remedy at law is not contingent upon a party's ultimate success in pursuing the action. *See Bersch v. Rust, Trustee*, 249 Pa. 512, 95 A. 108 (1915)("In deciding whether a remedy is adequate, it is the remedy itself, and not its possible lack of success that is the determining factor.")

the statute of limitations would bar a remedy at law is no ground in itself for applying to equity for relief unless plaintiff was prevented from suing by defendant's act." 30 C.J.S. Equity s 24d; *See also* 27 Am.Jur.2d Equity s 93; *Kane v. Morrison et al.*, 352 Pa. 611, 44 A.2d 53 (1945); *Home Owners' Loan Corp. v. Murdock*, 36 Luz.Leg.Reg. 270, *affirmed* 150 Pa.Super. 284, 28 A.2d 498 (1942); *Comm. ex rel. Reno v. Smith*, 48 Dauphin 217 (1940).")

At Oral Argument, PSU conceded that it could have brought a tort action for breach of fiduciary duty within the applicable statute of limitations. It was not prevented from doing so by any act of Spanier. Rather, the University made a conscious decision, despite the public disclosure of the 2012 Discovered Emails, to not initiate suit. We will not invoke the equitable powers of this Court to fashion a solution when PSU is responsible for its loss of an otherwise adequate remedy at law. We therefore intend to sustain Spanier's Preliminary Objection 7 on the basis that PSU had an adequate remedy at law.[30]

H. Preliminary Objection 8: Demurrer to Counterclaims 1, 2, 3, and 4 on the basis that PSU has waived its right to pursue the remedy of rescission

Spanier's Preliminary Objection 8 purports to assert a demurrer to all four of PSU's Counterclaims because "[e]ach of PSU's Amended Counterclaims seeks as a remedy rescission of the Separation Agreement and disgorgement of all fees paid to Dr. Spanier thereunder." Second Amended Counterclaims, ¶74. Spanier argues PSU waived any right to rescind the Separation Agreement because 1) it did not do so promptly and 2) it has admitted that, since its discovery of the facts that it alleges warrant rescission—

[30] We note that PSU made no attempt to suggest, outside of the Statute of Limitations consideration, that a claim for breach of fiduciary duty would not have provided the University with an adequate remedy at law.

including the 2012 Discovered Emails—the University continued to make payments and confer benefits on Spanier for over four years pursuant to the terms of the Separation Agreement. Plaintiff's Preliminary Objections, ¶79. In response, PSU argues that its delay in seeking to rescind was reasonable; that the parties can be restored to their former positions; and that it would be unfair to preclude PSU from pursuing rescission because, after the disclosure of the 2012 Discovered Emails, the University treated Spanier, who at that point was under criminal indictment, "charitably and favorably and decently", behavior that should not now preclude the remedy of rescission. Response to Preliminary Objections, ¶79; N.T. Oral Argument, June 28, 2017, at 56-57.

We begin by noting the error in Spanier's assertion that each of PSU's counterclaims requests the remedy of rescission. Counterclaims 1 and 2 request the remedy of rescission; Counterclaim 3 asserts an equitable cause of action for rescission. Counterclaim 4, however, makes no mention of rescission. Therefore, with respect to Counterclaim 4, Spanier's Preliminary Objection 8 is overruled.

Turning next to the remaining counterclaims and the substantive issues of the parties' positions, we consider both the promptness of the PSU's rescission request and PSU's continued performance, over at least a four year period,[31] after the 2012 disclosure of the Discovered Emails. In Pennsylvania, a party seeking to rescind a contract must do so promptly upon discovery of facts warranting rescission, or it waives the right to rescind. *Fichera v. Gording*, 424 Pa. 404, 406 (1967). "[I]t is his duty to act promptly, and in case he elects to rescind, to notify the other party without delay, or within a reasonable time."

[31] The pleadings of the parties suggest that PSU continued to make payments under the Separation Agreement at least until December 16, 2016.

Id. at 406, 227 A.2d at 643–44, *quoting* 8 Pennsylvania Law Encyclopedia § 258, *cited by Schwartz v. Rockey*, 932 A.2d 885, 894 n. 11, 593 Pa. 536, 551 n.11 (Pa., 2007).

In the instant case, PSU alleges that it first discovered the basis for its request of rescission—the 2012 Discovered Emails—in 2012. Second Amended Counterclaims ¶¶ 14-15, 44. Yet PSU did not file its first set of Counterclaims seeking rescission of the Separation Agreement until December 19, 2016. Even taking into account the Tolling Agreement entered by the parties on November 12, 2015 and utilizing that date for our calculations, PSU waited, at the very least, no less than three years after discovery of the Spanier's alleged nondisclosure before seeking to rescind the Separation Agreement.

Spanier has cited numerous Pennsylvania authorities to provide this Court with guidance as to what constitutes prompt action on the part of a party seeking rescission of a contract once an alleged misrepresentation of the other party is discovered. In each case, the Court found that unreasonable delay on the part of the claimant barred rescission. *See Fichera, supra*, 424 Pa. at 406 (holding that a delay of five years after discovery of an alleged misrepresentation barred rescission of the sale); *Schwartz, supra*, 593 Pa. at 547 (holding that a buyer's three-year delay in seeking rescission of a contract based on the other party's alleged non-disclosure was unreasonable and barred a claim for rescission); *Sixsmith v. Martsolf*, 413 Pa. 150, 152 (1964) (suggesting that an action for rescission instituted twenty-five months after the sale did not meet the requirement of prompt action).

PSU has failed to provide any authority in which a court granted rescission when the complainant waited three years after discovering an alleged misrepresentation or nondisclosure before seeking the equitable remedy. Instead of providing such authority,

PSU argues that it has pleaded that Spanier has not been prejudiced by the delay, and thus the matter is not appropriate for resolution at the preliminary objections stage.

We begin by noting that the prompt action requirement for rescission does not appear to be dependent upon a finding regarding whether the party against whom rescission is sought has been prejudiced by the delay. While case law suggests that, "[i]f possible, the rescission should be made while the parties can still be restored to their original positions," that additional caveat does not appear to erode the general principle that an election to rescind must happen "without delay" or "within a reasonable time." *Fichera, supra*, at 406. Instead, the lack of prejudice requirement creates an additional burden on the party seeking rescission.

We believe PSU's delay in this instance, a delay of at least three years, does not constitute prompt action. Moreover, PSU has not pleaded any facts or considerations that attempt to establish that its delay was reasonable.

Even if we were inclined to permit PSU to amend its counterclaims, for a third time, to include facts suggesting the reasonableness of its delay, such amendments would be futile, because PSU has admitted that, even after Spanier was indicted and the Discovered Emails became public in 2012, PSU continued to perform its duties under the Separation Agreement for at least four years. Second Amended Counterclaims, ¶55; PSU's Response to Preliminary Objections, ¶79. Under Pennsylvania law, such continued performance is fatal to any claim for rescission PSU might have had.

> "The principle is general that wherever a contract not already fully performed on either side is continued in spite of a known excuse, the defense thereupon is lost and the injured party is himself liable if he subsequently fails to perform, unless the right to retain the excuse is not only asserted but assented to": 3 Williston on Contracts, § 688, p. 1983; Restatement of the Law, Contracts, § 309.

Gray v. Maryland Credit Finance Corp., 25 A.2d 104, 106–07, 148 Pa.Super. 71, 76 (Pa.Super. 1942). *See also Surgical Laser Technologies, Inc. v. Heraeus Lasersonics, Inc.*, No. CIV.A. 90-7965, 1995 WL 70535, at 2 (E.D.Pa. Feb. 15, 1995).

As noted by Spanier, in *Fuller Co. v. Brown Minneapolis Tank & Fabricating Co.*, 678 F. Supp. 506 (E.D. Pa. 1987), the District Court, applying Pennsylvania law, addressed a claim similar to PSU's. In a breach of contract action, the defendant argued that it was entitled to rescind the agreement based on the claim that the defendant was fraudulently induced to enter into the contract by the plaintiff's misrepresentations. *Id.* at 509. Noting that the defendant had not promptly sought rescission of the agreement but had rather continued to perform and only chose to seek rescission after being sued for breach, the court held that the defendant's demand for rescission was barred by its continued performance.

> By electing to proceed with its performance, [Defendant] waived whatever right it may have had to rescind the contract on the grounds that [Plaintiff] had fraudulently included it into entering into the agreement....[A]s with a party's failure to seek rescission of a contract upon discovery of fraud in its inducement, a party cannot continue to perform under the contract and later be heard to say that the other party breached the agreement prior to continued performance, and therefore, no contract existed.

Id. at 509-510.

At Oral Argument, PSU argued that its "charitable", "favorable", and "decent" treatment of Spanier after his indictment and the public disclosure of the Discovered Emails in 2012 should not be held against the University as it now seeks rescission of the Separation Agreement. Pennsylvania law, however, provides no relief based upon merciful treatment of a party opponent. The University admits it continued to perform, for years, after it became aware of Spanier's nondisclosures. Such performance was an

affirmance of the Separation Agreement. *Gray, supra*, 25 A.2d at 105, 148 Pa.Super. at 105. Whatever PSU's motives and whatever platitudes it seeks to subscribe to its continued payment of substantial benefits[32] to Spanier in the wake of his indictment and the public disclosure of emails implicating him in the Sandusky cover-up, PSU's continued performance waived any claim to rescission of the Separation Agreement it might have once had. On that basis, we intend to sustain, with prejudice, Spanier's Preliminary Objection to the rescission remedies requested in Counterclaims 1 and 2 and to the entire equitable cause of action for rescission in Counterclaim 3.[33]

I. Preliminary Objection 9: Demurrer to Counterclaims 1, 2, 3, and 4 on the basis that PSU has failed to plead causation and injury[34]

The crux of Spanier's Preliminary Objection 9 is that, because other high ranking PSU officials were involved in the Sandusky cover-up and they were agents of the University, any alleged nondisclosures by Spanier cannot have damaged the University, because PSU, as a corporate entity, already had independent knowledge of that which it now complains Spanier did not disclose. We agree that PSU, as a corporate entity, cannot establish causation, because the University, through its other agents, already had knowledge of the information for which it faults Spanier's nondisclosure.

A corporation can acquire knowledge or notice only through its officers or agents. *A. Schulman, Inc. v. Baer Co.,* 197 Pa. Super. 429, 434 (1962). "In accordance with a well-established rule of the law of agency, a corporation is bound by the knowledge

[32] PSU has suggested that the benefits accruing to Spanier under the Separation Agreement amount to approximately $6 million. PSU's Memorandum in Opposition at 28.
[33] A discussion of laches, although argued by both parties, is not relevant to our decision.
[34] Our decision on the causation issue makes any analysis of the injury issue irrelevant. However, we note that PSU has pleaded injury, with enough specificity to theoretically survive preliminary objection on the issue,in that it argues it entered a contract requiring it to pay substantial benefits.

acquired by, or notice give to, its officers or agents . . . ." *Commw. Dept of Transportation v. Michael Moraiti, Upper Darby Auto Ctr., Inc.*, 34 Pa. Cmwlth. 27, 30 n.2 (1978).

PSU does not appear to deny these legal maxims. Nor does it deny that Gary Schultz, then Senior Vice president for Finance & Business/Treasurer of the University, and Tim Curley, then Director of Athletics for PSU, were agents of the University and had knowledge of the exact information PSU alleges Spanier did not disclose. What PSU does contest is whether their knowledge defeats the causation element of PSU's claims. PSU argues "the operative question is whether the particular University representatives who were involved in negotiating Dr. Spanier's Separation Agreement were aware of the information in question," and the Second Amended Counterclaims plead that they were not. Second Amended Counterclaims, ¶44.

> A corporation cannot disclaim knowledge of a fact on the ground that the fact in question has not been communicated to its chief executive officers and board of directors. A corporation acquires knowledge through its officers and agents 'and is charged with knowledge of all material facts of which they acquire knowledge while acting in the course of their employment and within the scope of their authority, even though they do not in fact communicate it.' 19 C.J.S. Corporations § 1078, page 613.

City of Philadelphia, Pa. v. Westinghouse Elec. Corp., 205 F.Supp. 830, 831 (D.C.Pa. 1962). Although PSU urges us to adopt a position different from that stated above, to find, as Spanier describes, that a corporate entity can partition its knowledge, PSU has failed to cite any case law supporting that principle.

We find, then, based upon the pleadings and governing law, that PSU as a corporate entity had knowledge of the information it faults Spanier for not disclosing prior to the execution of the Separation Agreement.[35] Such knowledge defeats the causation

[35] We also note that the 2012 Discovered Emails were readily available to PSU on its own email network, and that circumstance could also potentially defeat the causation element of any breach claim. *See Carr-*

element in any equitable claim based upon a breach of a duty of disclosure or mistake based upon a nondisclosure. Thus, we intend to sustain Spanier's Preliminary Objection 9.

J. Preliminary Objection 10: Demurrer to Counterclaim 4, unjust enrichment, on the basis that a valid contract defeats a claim for unjust enrichment

PSU's Counterclaim 4 asserts that Spanier has been unjustly enriched by its payments under the Separation Agreement.

> [T]he doctrine of unjust enrichment contemplates that "[a] person who has been unjustly enriched at the expense of another must make restitution to the other." *See, e.g., Binns v. First National Bank of California, Pennsylvania,* 367 Pa. 359, 80 A.2d 768, 775 (1951) (quoting *Restatement (First) of Restitution* § 1 (1937)). With that said, it has long been held in this Commonwealth that the doctrine of unjust enrichment is inapplicable when the relationship between parties is founded upon a written agreement or express contract, regardless of how "harsh the provisions of such contracts may seem in the light of subsequent happenings." *Third National & Trust Company of Scranton v. Lehigh Valley Coal Company,* 353 Pa. 185, 44 A.2d 571, 574 (1945); *see also Schott v. Westinghouse Electric Corporation,* 436 Pa. 279, 259 A.2d 443, 448 (1969); *Wingert et al. v. T.W. Phillips Gas & Oil Company,* 398 Pa. 100, 157 A.2d 92, 94 (1959) ("[The doctrine of unjust enrichment] applies only to situations where there is no legal contract."); *Durham Terrace, Inc. v. Hellertown Borough Authority,* 394 Pa. 623, 148 A.2d 899, 904 (1959). While it does not appear that this Court has expounded upon this rule of law, it has been recognized that this bright-line rule not only has "a distinguished common-law pedigree, but it also derives a great deal of justification from bedrock principles of contract law." *Curley v. Allstate Insurance *521 Company,* 289 F.Supp.2d 614, 620 (E.D.Pa.2003). Moreover, as the *Curley* court noted,
>
> > [this] bright-line rule also has deep roots in the classical liberal theory of contract. It embodies the principle that parties in contractual privity ... are not entitled to the remedies available under a judicially-imposed quasi[-]contract [i.e., the parties are not entitled to restitution based upon the doctrine of unjust enrichment] because the terms of their agreement (express and implied) define their respective rights, duties, and expectations.

Consol. Biscuit Co. v. Moore, 125 F. Supp. 423, 432 (M.D. Pa. 1954) (a corporation is charged with knowledge of information known to its officers and appearing in its own records).

Id. at 620–21.

Wilson Area School Dist. v. Skepton, 895 A.2d 1250, 1254, 586 Pa. 513, 520–21 (Pa.,2006)

Spanier has demurred to PSU's Counterclaim 4 for unjust enrichment, arguing that the remedy is unavailable because of the existence of two contracts governing the relationship between the parties: the 2010 Employment Agreement and the 2011 Confidential Settlement Agreement. PSU counters that, while it is true that the remedy of unjust enrichment is unavailable when the relationship between the parties is founded on an express contract, "the entire crux of the University's Counterclaims is that the Separation Agreement is invalid and unenforceable." Memorandum in Opposition at 11. Therefore, PSU argues, the existence of the Separation Agreement between the parties does not preclude PSU from seeking relief based upon a theory of unjust enrichment. We disagree with PSU, which again has cited no case law directly supporting its position, and intend to sustain Spanier's Preliminary Objection 10, with one caveat.

For the reasons expressed in previous sections of this Opinion, we have found that both the 2010 Employment Agreement and the 2011 Confidential Settlement Agreement were valid and enforceable during their controlling periods. As such, for claims of unjust enrichment arising prior to November 9, 2011 and after November 22, 2011, the existence of those agreements bars PSU from pursuing the equitable relief of unjust enrichment.[36]

[36] At Oral Argument, PSU argued that if its breach of contract action survived, then its claim for unjust enrichment failed. However, if its breach of contract action failed, then its claim for unjust enrichment was viable. N.T. Oral Argument, June 28, 2017, at 66. We do not believe the choice before us is the binary one suggested by counsel. PSU's breach of contract failed not because there was no valid contract between the parties; it failed because PSU failed to file suit for breach within the appropriate time period.

As we discussed in relation to Preliminary Objection 1, however, we do find there is a "no man's land" period between November 9, 2011 and November 22, 2011, when the relationship between the parties was not governed by contract. In the event the University provided benefits to Spanier during that time period,[37] we cannot summarily say at the Preliminary Objection stage that the University has, as a matter of law, no possible cause of action for unjust enrichment arising from the parties' relationship during that 11-day span of time. Thus, while we intend to sustain, with prejudice, Spanier's Preliminary Objection to PSU's Counterclaim 4 for unjust enrichment for all dates except the period from November 9-November 22, 2011, we note, for academic purposes, that we would permit PSU to amend Counterclaim 4 to plead a limited equitable enrichment action for benefits bestowed on Spanier during the narrow period from November 9-November 22, 2011. However, in light of our ruling sustaining Preliminary Objection 9, even this limited potential avenue for relief is not open to PSU.

We will enter an appropriate Order.

[37] We emphasize such benefits would be salary payments or other monetary gain paid or granted during that time period. We do not mean to suggest benefits under the Separation Agreement bargained for during that time period but only paid at some future date, outside the 11- day period, would be recoverable in an action for unjust enrichment.